Supreme Court, U.S.
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No. 04 341

In the

SUPREME COURT OF THE UNITED STATES

TIMOTHY P. ZOELLICK,
Petitioner,

v.

STATE OF WISCONSIN,
Respondent.

On Petition For Writ Of Certiorari
To The Wisconsin Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Can a statute prohibiting disorderly conduct be constitutionally applied to punish mere presence in a public place?

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PETITION FOR WRIT OF CERTIORARI

Timothy P. Zoellick respectfully petitions for a writ of certiorari to the Wisconsin Supreme Court.

OPINIONS BELOW

The unreported order of the Wisconsin Supreme Court denying Petitioner's petition for review is reproduced at page 1a of the appendix to this petition ("Pet. App."). The unpublished opinion

of the Wisconsin Court of Appeals is produced at Pet. App. page 3a. The transcript of the oral decision of the trial court denying petitioner's motion to dismiss is reproduced at Pet. App. page 20a.

JURISDICTION

On June 8, 2004, the Wisconsin Supreme Court issued an Order denying the petitioner's petition for review. The statutory basis for this Court's jurisdiction is found in 28 U.S.C. §1257(a).

STATUTE AND CONSTITUTIONAL PROVISIONS INVOLVED

The statute at issue is Wis. Stat. §947.01.

> **947.01 Disorderly conduct.** Whoever, in a public or private place, engages in violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct under circumstances in which the conduct tends to cause or provoke a disturbance is guilty of a Class B misdemeanor.

The question presented does not raise a facial challenge to the statute, but rather challenges its application on the facts presented.

The constitutional provisions involved in this case as recited in Zoellick's motion to dismiss

brought in the trial court include "the Fourth, Fifth, and Fourteenth Amendments to the Constitution of the United States . . . ." In addition to being deprived of a clear statement of the essential facts constituting the offense charged as asserted in that motion, this case also implicates Zoellick's fundamental inherent rights:

> [T]he freedom to move about is a basic right of citizens under our form of government, in fact, under any system of ordered liberty worth the name. It was not added to our United States Constitution by the enactment of the first ten amendments. It is inherent, not only in the Bill of Rights, but in the original document itself. It has properly been termed "engrained in our history" and "a part of our heritage."
>
> *Ervin v. State*, 41 Wis. 2d 194, 200-201, 163 N.W.2d 207 (1968).

STATEMENT OF THE CASE

On December 31, 2001, petitioner Timothy Zoellick was stopped by a sheriff's deputy investigating a complaint of a suspicious vehicle in a residential neighborhood. Zoellick was cooperative, producing identification upon request. He was removed from his vehicle and detained in the back of a locked squad car while attempts were made to

contact his parole officer. Zoellick was placed on a hold by his parole officer, and his parole was subsequently revoked.

In March of 2002, Zoellick was charged with two counts of stalking. After three unsuccessful attempts to fashion a complaint alleging facts sufficient to establish probable cause for a stalking charge, the Calumet County District Attorney ultimately resorted to filing a third-amended complaint charging two counts of disorderly conduct.

Count 1 of the third-amended criminal complaint alleged that on Saturday, December 29, 2001 Zoellick did, in a public or private place, engage in profane, indecent, unreasonably loud, abusive, violent, boisterous or otherwise disorderly conduct, under circumstances in which said conduct tended to provoke a disturbance. Count 2 of that complaint alleges that on Monday, December 31, 2001, Zoellick did the same.

The probable cause portion of that complaint alleges that on December 31, 2001 a deputy was dispatched in response to a suspicious vehicle complaint reported by Linda Bisbee's daughter, Maren Bisbee. Maren reported that she had seen a vehicle that she believed to be driven by a person who had been "stalking her mother" drive by their residence twice that morning. A unit was dispatched, and no such vehicle was found in the area at that time. Then, at approximately 11:52 a.m., Maren Bisbee once again contacted the Sheriff's

Department, and this time a deputy did stop a common vehicle matching the complainant's description, identified the operator of the vehicle as petitioner Timothy P. Zoellick, and questioned him regarding the reason he was in the area. This is the incident giving rise to the second Count of the third-amended criminal complaint.

The probable cause section of that complaint then goes on to reference Linda Bisbee's subsequent statement given on February 2, 2002. On December 29, 2001 the Bisbees had reportedly seen a small gray vehicle drive past a restaurant they were patronizing, and then turn around. As they were leaving the restaurant, they reportedly saw petitioner, Timothy Zoellick walking towards them. The complaint confirms that Zoellick did not say a word to them, or engage in any other conduct which could be deemed objectively to be disorderly. This incident was not reported to law enforcement at the time it occurred.

After referencing confirmation that no contact with Linda Bisbee was a condition of Zoellick's parole, the third-amended complaint also incorporates by reference an attached e-mail from Linda Bisbee reciting allegations of conduct dating back twenty-five years, to junior high and high school, that according to the complaint "created or provoked a disturbance."

Zoellick challenged the sufficiency of the third-amended complaint, *citing* *State v. Werstein*, 60 Wis. 2d 668, 674, 211 N.W.2d 437 (1973) for the

proposition that Wisconsin's disorderly conduct statute could not constitutionally be applied on these facts. The trial court denied the defendant's motion. See Pet. App. page 20a. The issue of the propriety of the State's application of the disorderly conduct statute to the facts of this case was thus expressly raised, argued, and decided in the trial court. These arguments were repeated at trial, and came back into play on the issue of whether the evidence was sufficient to sustain Zoellick's convictions.

The prosecution failed to timely disclose with particularity the other acts evidence it intended to offer, requiring the *voir dire* of Linda Bisbee outside of the presence of the jury on the day of trial. Without ever engaging in the analysis required under State v. Sullivan, 216 Wis. 2d 768, 772-773, 576 N.W.2d 30 (1998), the trial court allowed a substantial quantity of the proffered other acts evidence in at trial. Relying heavily upon that evidence, and irrelevant argument regarding Zoellick's intent, the State obtained verdicts of "guilty" as to both counts.

Timely notice of intent to pursue post-conviction relief was filed. Appeal was then taken. On March 24, 2004, the Court of Appeals issued its unpublished opinion. It declined to address the constitutionality of the statute as applied, and rejected the need for "a ***Sullivan***-type analysis" of the other acts evidence admitted and relied upon to convict Zoellick. A timely petition for review was filed with the Wisconsin Supreme Court, and on June 8, 2004, the Wisconsin Supreme Court issued an order

denying review. Justice Ann Walsh Bradley dissented from that order.

REASONS FOR GRANTING THE WRIT

In this case, a trial court that had prejudged Zoellick as a "weirdo" and "pervert"[1] allowed the State to expressly advocate that the jury disregard the law and apply its own standards to punish Zoellick for acts occurring years earlier. This case raises real and significant questions regarding the constitutionality of the disorderly conduct statute as applied in this case, as well as the overt blessing of the unfettered use of other acts evidence in such cases.

Wisconsin Statutes §947.01 prohibiting disorderly conduct states that "whoever, in a public or

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[1] As early as the June 4, 2002 hearing on defendant's motion to dismiss the original complaint, the trial court made its own pre-judgment clear:

> THE COURT: Well, you know, first of all, what we are dealing with here is the "reasonable person" standard. Now, do you think that a reasonable person reads the newspapers, watches television, sees the news, and knows what kind of "weirdos" are out there in our society? "Perverts, molesters, rapists, sickos", whatever you want to call them, they are out there, in the community. We all know that, because all we have to do is turn on the television news at 5:30 and six o'clock at night. We can hear all about them, because they are out there raping, robbing, murdering people, kidnapping them.
>
> R. 69, p. 13

private place, engages in violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct under circumstances in which the conduct tends to cause or provoke a disturbance is guilty of a Class B misdemeanor." In order to prove a violation of the statute, the State must prove two elements. First, the State must prove that the accused engaged in one of the prohibited types of conduct. Second, the State must also prove that said conduct, under the circumstances as they then and there existed, tended to cause or provoke a disturbance.

Wisconsin's disorderly conduct statute was first promulgated in its current form in 1953. See *State v. Schwebke*, 2002 WI 55, ¶34, n. 6, 253 Wis. 2d 1, 644 N.W. 2d 666. The proposed version of the statute and accompanying comments cited by the Wisconsin Supreme Court in *Schwebke* reference Louisiana Statutes §14.103 (1950) as "analogous legislation". Wisconsin Legislative Council, Judiciary Committee Report on the Criminal Code, 209 (1953).

In the early 1960s this Court addressed the Louisiana breach of the peace statute no fewer than four separate times, consistently holding that it could not constitutionally be applied to punish public presence that others might find disturbing absent conduct that could be deemed overtly disorderly. See *Brown v. Louisiana*, 383 U.S. 131 (1966), *citing Garner v. Louisiana*, 386 U.S. 157 (1961); *Taylor v. Louisiana*, 370 U.S. 154 (1962); and *Cox v. Louisiana*, 379 U.S. 536 (1965).

Subsequently, in *State v. Werstein*, 60 Wis. 2d 668, 674, 211 N.W.2d 437 (1973), the Wisconsin Supreme Court rejected the State of Wisconsin's contention that the mere presence of the defendants in a room at the Armed Forces Induction Center in support of an individual who planned to refuse induction caused staff to fear for their safety and was thus otherwise disorderly. Citing this Court's decision in *Brown v. Louisiana*, *supra*, the *Werstein* court noted that it was ". . . uncontroverted that the defendants' conduct was not violent, abusive, indecent, profane, boisterous or unreasonably loud. The defendants were merely present." 60 Wis. 2d at 674. Citing its own earlier decisions, the Wisconsin Supreme Court noted that the statute does not punish a person for conduct which might possibly offend some particular individual. Rather, the statute proscribes ". . . substantial intrusions which offend the normal sensibilities of average persons or which constitute significantly abusive or disturbing demeanor in the eyes of reasonable persons." 60 Wis. 2d at 674 [citation omitted].

In *Brown*, the State of Louisiana contended that the mere presence of the black male defendants in a segregated library was sufficient to "unnerve" the librarian, rendering their mere presence disorderly. This Court rejected that contention:

> We can find nothing in the language of the statute, in fact, which would elevate giving of cause for [the librarian's] discomfort, however we

> may sympathize with her, to a crime against the State of Louisiana.
>
> *Brown v. Louisiana, supra*, at p. 141.

The Wisconsin Supreme Court deemed that rationale controlling when construing the Wisconsin statute in *Werstein, supra*.

Therefore, the mere presence of an individual who may be deemed by some to be offensive cannot constitutionally be criminalized, and is not prohibited by the statute. Yet this is exactly what the prosecutor invited the jury to do in this case. In the State's final closing argument, the jurors, their passions aroused by evidence of other alleged uncharged acts, were told they could disregard the plain language of the statute, the constitution, and, without restriction, simply set and enforce their own norms:

> [Defense counsel] concluded by saying: "That is part of life. People will disturb us, and we have to put up with it." No, we don't. We don't have to put up with being disturbed because we, as a community, can decide what is going to be tolerated, and what is not going to be tolerated. Although a public demonstration about the war, either pro or con, may be something that the community is willing to tolerate, Mr. Zoellick's behavior should not be tolerated.

> It should not be the type of behavior that this community is willing to tolerate, at the expense of Mrs. Bisbee, and at the expense of her family, and the expense of her children. Ladies and gentlemen of the jury, "you" are the community. You are the community standards, that decides whether or not you will tolerate it.
>
> Jury Trial Transcript, pp. 177-178.

This is a gross misstatement of the law. The rights of demonstrators, pro or anti-war, are governed by the law, not the unrestrained preferences of the community in which the demonstration occurs. Likewise, a jury aroused by other acts evidence cannot turn innocuous conduct into "otherwise disorderly conduct" simply because they share the prosecutor's desire to punish.

Prior to the Wisconsin Supreme Court's decision in *Schwebke*, *supra*, all of its decisions sustaining the disorderly conduct statute against constitutional challenge factually involved "a public aspect" to the conduct punished. 2002 WI 55, ¶ 28, n. 5. In that landmark decision, the majority opinion held for the first time "... that the disorderly conduct statute does not necessarily require disruptions or disturbances that implicate the public directly." *Id.*, at ¶ 30. The *Schwebke* majority went on to hold that Schwebke's repeated and personal mailings could be

found by a rational trier of fact to constitute otherwise disorderly conduct.[2]

Despite expanding the application of the statute to private conduct, the *Schwebke* majority continued to require the existence of a true threat that at least had the potential to impact public peace and order:

> Nevertheless, we conclude that the disorderly conduct statute requires, at a minimum, that, when the conduct tends to cause or provoke a disturbance that is private or personal in nature, there must exist the real possibility that this disturbance will spill over and cause a threat to the surrounding community as well.

Id., at ¶ 31.

Given the factual comparison noted above between the disorderly conduct statute as applied against Zoellick and the conviction reversed by this Court in *Brown v. Louisiana*, *supra*, the *Schwebke* dissent was in fact prescient with its observations:

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[2] The majority held that constitutional concerns regarding overbreadth were not implicated "because the content of the mailings is not being directly prosecuted... ." 2002 WI 55, ¶ 38. Confusingly, the majority also seems to rely upon the content of those mailings to justify its ultimate conclusion. *Id.*, at ¶ 32. Those same implicit overbreadth issues were raised on appeal in this case, but not addressed in the decision of the Wisconsin Court of Appeals, despite its express reliance on *Schwebke*.

> The court seems to be moving the disorderly conduct statute back to the laws of the 1950s and 1960s that gave law enforcement officers and prosecutors broad discretion to arrest and prosecute people. Those laws are characterized as "so broad that they 'legally' authorize the police to arrest virtually anyone."
>
> 2002 WI 55, ¶ 53 [footnote omitted].

As in *Brown*, *Garner*, *Taylor*, and *Cox*, *supra*, the record in this case offers no basis for a finding that the conduct deemed "disturbing" also constituted a "disturbance" exhibiting a real possibility of spilling over into the public domain as required by the above cases. The unpublished decision of the Wisconsin Court of Appeals has thus decided the important questions of federal law presented by this case in a way that directly conflicts with the relevant prior decisions of this Court.

In addition, as the *Schwebke* dissent also noted, in that case the State was unabashed about stating its intent to broadly apply the disorderly conduct statute in that case to expressly use the *second* element to throw open the door to prior offense evidence as "context." 2002 WI 55, ¶ 48. The Wisconsin Court of Appeals' decision on this point not only approves this approach, but also overtly approves the use of prior acts evidence utterly without restriction, to establish "context" on the first

element as well. This serves to effectively remove any objective basis for limiting the application of the "otherwise disorderly" catch-all.

Under *State v. Sullivan*, 216 Wis. 2d 768, 772-773, 576 N.W.2d 30 (1998), the burden of establishing the relevance of other acts evidence lies with the proponent of the evidence. Disorderly conduct is not an intent crime. Therefore, absent an issue as to identity, the first prong of *Sullivan* analysis cannot be met in a case where disorderly conduct is the only charge. Nonetheless, the State was still permitted to use and expressly argued to the jury that the other acts evidence in this case should be relied upon by the jury for this very purpose.

The bulk of the testimony in this case was not about the conduct charged, but rather about incidents occurring a decade or more earlier. Despite the inflammatory nature of the evidence, its age, and the deliberately exploited potential for misuse by the jury, the Court of Appeals approved its use against Zoellick without so much as a passing nod to the requirements of *Sullivan*, and the Wisconsin Supreme Court declined further review.

CONCLUSION

As applied in this case, the statute used to criminally punish Zoellick's presence in public would allow the arrest and prosecution of any individual whose public presence is deemed unpalatable, regardless of whether or not that individual actually engages in any prohibited conduct. The dangers of allowing such a construction to stand are self-evident, especially at a time when the public at large may be willing to sacrifice time-honored freedoms for the illusion of security. As Benjamin Franklin noted in 1755, "those who would give up essential liberty, to purchase a little temporary safety, deserve neither liberty nor safety." This petition for a writ of certiorari should be granted.

Respectfully submitted,
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Petitioner

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June 8, 2004

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You are hereby notified that the Court has entered the following Order:

No. 03-2341-CR
State v. Timothy P. Zoellick
L.C. #02CM000058

A petition for review pursuant to Wis. Stat. § 808.10 having been filed on behalf of defendant-appellant-petitioner, Timothy P. Zoellick, and considered by this court;

IT IS ORDERED that the petition for review is denied, without costs.
Bradley, J., dissents.

Cornelia G. Clark
Clerk of Supreme Court

COURT OF APPEALS
DECISION
DATED AND FILED

March 24, 2004

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62

Appeal No. 03-2341-CR Cir. Ct. No. 02CM000058

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,
PLAINTIFF-RESPONDENT,

v.

TIMOTHY P. ZOELLICK,
DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Calumet County: DONALD A. POPPY, Judge. *Affirmed.*

¶1 BROWN, J.[1] Timothy P. Zoellick appeals from a judgment of conviction for two counts of disorderly conduct, contrary to WIS. STAT. § 947.01, for walking past the alleged victim in a parking lot and repeatedly driving past her home. Zoellick now seeks reversal of the conviction based on the assertion that, as a matter of law, the disorderly conduct statute cannot apply to such "innocuous" conduct. Based on our supreme court's decision in ***State v. Schwebke***, 2002 WI 55, 253 Wis. 2d 1, 644 N.W.2d 666, *cert. denied*, 537 U.S. 1090 (U.S. Wis. Dec. 16, 2002) (No. 02-6140), we hold that the disorderly conduct statute can apply to such conduct where there is a real possibility that his or her disturbance will spill over and cause a threat to the surrounding community. We also conclude that (1) the complaint set forth a factual basis sufficient to support the crimes charged, (2) the evidence adduced at the jury trial was sufficient to sustain the guilty verdict as to both counts of disorderly conduct, (3) the trial court correctly suppressed inculpatory statements Zoellick had made during the investigative stop leading to his arrest, and (4) the trial court properly admitted testimony from the alleged victim concerning Zoellick's pattern of conduct. We affirm.

¶2 The pertinent facts are as follows. In March 2002, the State charged Zoellick with two counts of stalking for incidents occurring on December 29 and December 31, 2001. The State later

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[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

amended this complaint. After the court dismissed this amended complaint, the State filed its third and final amended complaint in January 2003, charging Zoellick with two counts of disorderly conduct.

¶3 The third amended complaint alleged that on December 31 at approximately 10:40 a.m., Deputy Paul Preissner of the Calumet County Sheriff's Department responded to a suspicious vehicle complaint, which was reported by Maren Bisbee. Maren stated that she had observed a vehicle drive by the Bisbee residence twice that morning. ***Id.*** She believed the vehicle was driven by the person who was stalking her mother, Linda Bisbee. Preissner was unable to locate the vehicle in the area at that time. Then, at approximately 11:52 a.m., Maren once again contacted the sheriff's department about a suspicious vehicle. This time, Preissner located and stopped the suspect vehicle, making contact with the driver, Zoellick. The complaint states that when Preissner spoke with Zoellick, he "was very evasive about why he was in the area."

¶4 The complaint alleges that Gerald A. Pagel, an investigator with the Calumet County Sheriff's Department, responded to assist Preissner with the stop. Upon his arrival, Pagel asked Zoellick why he was in the area. The complaint alleges that in response, Zoellick made inculpatory statements, including that he had driven past the Bisbee residence on three separate occasions on that particular day and that he was also in the area on December 29. Zoellick indicated to Pagel that he had gone to school with Linda and admitted that he had driven past her

residence in the past while she was living in other cities. Zoellick informed Pagel that he had not attempted to personally make contact with Linda, but admitted that "he has made attempts to always learn where she is living."

¶5 The complaint also references a report submitted by Pagel, who met with Linda and her husband Douglas Bisbee on February 2. Linda indicated that she had known Zoellick for approximately twenty-five years, having gone to school with him. Both Douglas and Linda stated that they had observed a vehicle driving past their residence on a regular basis since June of the previous year. The Bisbees indicated that on December 29, they were at a restaurant and observed the same vehicle drive past the restaurant and turn around. As they were leaving the restaurant, Zoellick walked towards them and watched them get into their vehicle.

¶6 Zoellick challenged the sufficiency of this complaint, arguing that his conduct did not constitute disorderly conduct because he did not do "anything to provoke a disturbance other than being in the presence of the alleged victims." The trial court denied Zoellick's motion to dismiss.

¶7 Prior to the jury trial, Zoellick filed a motion to suppress the incriminating statements he made to Pagel during the December 31 *Terry*[2] stop. Zoellick argued that at the time of the stop, he was in

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[2] *Terry v. Ohio*, 392 U.S. 1 (1968).

custody and interrogated without having been ***Mirandized.***[3]

¶8 At the motions hearing, Pagel testified that on December 31, 2001, he was asked to assist Preissner in the investigation of a stalking allegation in the area. He further testified that he arrived at the scene only "a few seconds" after the stop was made. He testified that Zoellick was in the back seat of the squad car, but was not handcuffed, when he arrived. After discussing the situation with Preissner, Pagel opened the door to the squad car and asked Zoellick if it would be okay if he spoke with him. Zoellick told Pagel that "it would be fine" and Pagel got in the car and sat next to Pagel. Pagel informed Zoellick that he was not under arrest or otherwise in custody and the he was conducting a ***Terry*** stop. Pagel testified that he did not have his gun drawn and the door to the squad car was open at all times. Pagel then testified about Zoellick's inculpatory statements. He testified that Zoellick stated that he had been driving past Linda's home "to let her know that he is in the area." Zoellick also told Pagel that he had engaged in similar conduct when the Bisbees had lived in Minnesota and other areas of Wisconsin. Based on Pagel's testimony, the trial court denied the motion. The court concluded that Zoellick was not in custody and his statements were made voluntarily.

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[3] *See* ***Miranda v. Arizona***, 384 U.S. 436 (1966).

¶9 Thereafter, the State filed a motion to allow the introduction of "other acts" evidence. The State sought to introduce evidence of Zoellick's alleged stalking of four other women in Wisconsin and of his alleged twenty-five year history of stalking Linda. The trial court disallowed the stalking evidence as to the other four victims and limited the testimony to that of Linda. Prior to ruling upon the admissibility of the pattern of conduct between Zoellick and Linda, the court required voir dire of Linda on the day of the trial. Following her testimony, the court ruled that the "pattern of behavior" of Zoellick was relevant, as it impacted Linda, and the court allowed only the portions of Linda's testimony where she was able to point to a specific documented instance or where she could specify the approximate date and time of the conduct.

¶10 At trial, Linda testified to the twenty-five year history between Zoellick and herself. She testified that beginning in 1976, when she was in the eighth grade in Watertown, Zoellick would follow her around school. This continued on into high school where Zoellick would follow her from one class to another, when she left her house, through stores and throughout the community. Zoellick did not cease his behaviors despite Linda's request that he leave her alone. Linda testified that upon graduation from high school, she and her husband moved to Moorhead, Minnesota to attend college. While they lived in Minnesota, Zoellick continued to show up at least two times a year in person and to call her residence on numerous occasions. As a result, Linda called the police and had her phone disconnected. The Bisbees

tried to move from Moorhead without the knowledge of Zoellick, but Zoellick showed up on moving day and so the Bisbee's left town under the cover of night. Linda testified that Zoellick continued his pattern of behavior when they moved to Dubuque, Iowa. According to Linda, his behavior made it difficult for them to visit their parents in Watertown because he would follow them wherever they went.

¶11 Linda further testified that when they moved to Wisconsin Rapids in 1988, his continued contacts led to a restraining order. Zoellick, however, violated court orders on at least ten occasions, including the same day the restraining order was issued. Linda testified that Zoellick's conduct left her feeling disturbed, frightened and that the fear and disturbance now extended to her children. She also stated that on December 29 and 31, Zoellick's behavior did cause a disturbance, that she feared for her children's safety and that her daughter had become frightened.

¶12 Douglas also testified at the trial. He indicated that he has been familiar with Zoellick's conduct since the 1970s and had observed the same behaviors as his wife. He also described the impact the incidents of December 29 and 31 had on his wife and daughter. He testified that it upset them both, making them feel insecure and threatened.

¶13 Following a one-day trial, the jury convicted Zoellick of both counts of disorderly conduct. Zoellick appeals.

¶14 We begin by addressing Zoellick's claims that the complaint failed to set forth essential facts constituting the offenses charged and that the evidence presented at trial was insufficient to sustain the guilty verdicts. His appeal, however, presents more than these simple questions. Instead, the underlying issue is whether, based on the facts, the disorderly conduct statute can, as a matter of law, apply to Zoellick's conduct. Zoellick contends that the "Wisconsin Supreme Court has repeatedly held that mere presence in a public place, absent *conduct* tending to cause or provoke a disturbance does not constitute disorderly conduct." Thus, according to Zoellick, it follows that his presence at a restaurant and driving down the street "cannot in and of themselves constitute otherwise disorderly conduct."

¶15 Our three-step analytical framework for addressing Zoellick's arguments is as follows. First, we will address Zoellick's arguments pertaining to whether the disorderly conduct statute can be applied to his behavior. Second, we will examine whether the complaint set forth sufficient facts to constitute disorderly conduct. Third, we will consider whether the evidence presented at trial was sufficient to convict him on both counts.

¶16 WISCONSIN STAT. §947.01 states as follows: "Whoever, in a public or private place, engages in violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct under circumstances in which the conduct tends to cause or provoke a disturbance is guilty of a Class B misdemeanor." The State must prove two

elements to convict a defendant under this statute. ***State v. Douglas D.***, 2001 WI 47, ¶15, 243 Wis. 2d 204, 626 N.W.2d 725. First, it must prove that the defendant engaged in violent, abusive, indecent, profane, boisterous, unreasonably loud, or similar disorderly conduct. ***Id.*** Second, it must prove that the defendant's conduct occurred under circumstances where such conduct tends to cause or provoke a disturbance. ***Id.*** An objective analysis of the conduct and circumstances of each particular case must be undertaken because what may constitute disorderly conduct under some circumstances may not under others. *See* ***State v. A.S.***, 2001 WI 48, ¶33, 243 Wis. 2d 173, 626 N.W.2d 712.

¶17 In ***Schwebke***, 253 Wis. 2d 1, ¶30, our supreme court discussed whether the disorderly conduct statute encompasses conduct that does not implicate the public directly, but rather tends to cause a disturbance or disruption that is personal or private in nature. There, Schwebke was charged with fourteen counts of disorderly conduct arising from mailings and telephone calls directed at four individuals. ***Id.***, ¶2. On appeal, Schwebke asserted that such personal and private annoyance is insufficient to support a conviction of disorderly conduct. ***Id.***, ¶25. Schwebke claimed that the supreme court had traditionally upheld disorderly conduct convictions where there had been a threat to public order or public peace. ***Id.***, ¶28. The court rejected his argument, explaining:

> We certainly agree with Schwebke that, from our jurisprudence, the

> statute is appropriately applied in instances where conduct, under the circumstances, has a tendency to provoke a disruption to the public peace, public safety, or public order or is likely to cause a reaction from the community based on the fact that the public peace, public order, or public safety is being threatened. We conclude, however, that the disorderly conduct statute does not necessarily require disruptions or disturbances that implicate the public directly. The statute encompasses conduct that tends to cause a disturbance or disruption that is personal or private in nature, as long as there exists the real possibility that this disturbance or disruption will spill over and disrupt the peace, order or safety of the surrounding community as well. Conduct is not punishable under the statute when it tends to cause only personal annoyance to a person. *See* ***Douglas D.***, 2001 WI 47, ¶27. An examination of the circumstances in which the conduct occurred must take place, considering such factors as the location of the conduct, the parties involved, and the manner of the conduct.

Schwebke, 253 Wis. 2d 1, ¶30. Based on this analysis, the court concluded that the disorderly

conduct statute was appropriately applied to Schwebke's conduct. ***Id.***, 32. The court explained that in each instance, the conduct at issue, in light of the circumstances, went beyond conduct that merely tended to annoy or cause personal discomfort in another person and was disruptive to peace and good order in the community. ***Id.*** The court reasoned that the mailings caused other friends and relatives and coworkers to become concerned for the safety of the victims and that the conduct necessitated the involvement of the police. ***Id.***

¶18 Applying ***Schwebke*** to this case, we conclude that the disorderly conduct statute was appropriately applied to Zoellick's conduct. As ***Schwebke*** teaches, the disorderly conduct statute does not require that the defendant's conduct directly implicate the public. Rather, the statute applies to conduct that is personal or private in nature, as long as there exists "the real possibility that this disturbance will spill over and disrupt the peace, order or safety of the surrounding community as well." ***Id.***, ¶31. Here, as in ***Schwebke***, Zoellick's conduct, in light of the circumstances, went beyond conduct that merely tended to annoy or cause personal discomfort to another person and was of the type that tended to be disruptive of the community itself. The disturbing nature of Zoellick's conduct toward Linda caused Linda's husband and child to fear for their own and Linda's safety. Furthermore, such conduct necessitates the involvement of the police, who were contacted on more than one occasion, and the entire judicial system.

¶19 Zoellick also contends that "the statute does not and cannot punish a person for conduct possibly offensive to a hypersensitive individual." Rather, according to him, the standard to be applied is that of an objectively reasonable person and we may not consider the context in which Zoellick's behavior occurred. This argument runs directly contrary to the majority's holding in ***Schwebke***. As ***Schwebke*** tells us, in determining the applicability of the disorderly conduct statute, we are to look to "the circumstances in which the conduct occurred . . . considering such factors as the location of the conduct, the parties involved and the manner of the conduct." ***Id.***, ¶30. Thus, it is entirely appropriate for us, and the trial court, to view Zoellick's conduct in the context in which it occurred–a twenty-five year history of obsessive behavior. It follows that the standard to be applied is that of a reasonably objective person aware of the surrounding circumstances.

¶20 Further, although Zoellick concedes that ***Schwebke*** holds that the disorderly conduct statute can, in some circumstances, apply to a disturbance that is personal or private in nature, he nevertheless extols the virtues of the dissent in ***Schwebke***. There, Chief Justice Shirley S. Abrahamson wrote:

> The court seems to be moving the disorderly conduct statute back to the laws of the 1950s and 1960s that gave law enforcement officers and prosecutors broad discretion to arrest

> and prosecute people. Those laws are characterized as "so broad that they 'legally' authorize the police to arrest virtually anyone."

Id., ¶53 (Abrahamson, J., dissenting). Regardless of how strong and persuasive Zoellick believes the dissent to be, the majority opinion is the one that binds us and drives our conclusion.

¶21 Finally, Zoellick argues that the State's application of the disorderly conduct statute to his conduct renders the statute unconstitutionally overbroad. He maintains that "the record reveals that [the constitutional] issues were raised, and ruled upon by the trial court." Zoellick, however, fails to provide a cite to the record substantiating his claim. We have painstakingly paged through the record and have found no evidence that Zoellick raised the overbreadth claim before the trial court. We have repeatedly held that we will not consider an issue raised for the first time on appeal, especially a claim that a statute is unconstitutional. *See* ***Tomah-Mauston Broadcasting Co., Inc. v. Eklund***, 143 Wis. 2d 648, 657-58, 422 N.W.2d 169 (Ct. App. 1988). We, therefore, decline to address Zoellick's constitutional challenge.

¶22 Having established that the disorderly conduct statute may be applied to Zoellick's conduct, we now turn to the question of whether the complaint in this case set for the facts constituting disorderly conduct. A criminal complaint is a self-contained charge that must set forth facts within its four corners

that are sufficient, in themselves or together with reasonable inferences to which they give rise, to allow a reasonable person to conclude that a crime was probably committed and the defendant is probably culpable. ***State v. Haugen***, 52 Wis. 2d 791, 793, 191 N.W.2d 12 (1971); ***State v. Hoffman***, 106 Wis. 2d 185, 197, 316 N.W.2d 143 (Ct. App. 1982). To be sufficient, a complaint must be only minimally adequate. This is to be evaluated in a commonsense, rather than a hypertechnical, manner in setting forth the essential facts establishing probable cause. ***State v. Gaudesi***, 112 Wis. 2d 213, 219, 332 N.W.2d 302 (1983). The sufficiency of a complaint is a matter of law and is addressed de novo by the reviewing court. *See, e.g.*, ***id.*** at 219-21.

¶23 Here, the allegations in the third amended complaint were sufficient to establish probable cause that Zoellick had committed the offense. The complaint describes Zoellick's twenty-five history of contacting Linda, his conduct towards Linda and her family on December 29 and 31 (walking past her in a parking lot and repeatedly driving past her home) and the disruption it caused Linda and her family. The complaint further indicates that his conduct necessitated the involvement of both the police more than once and of the judicial system. This is sufficient to satisfy the minimal requirements for a complaint.

¶24 We now turn to Zoellick's claim that the evidence was insufficient to support his conviction on both disorderly conduct counts. The State bears the burden of proving all elements of a

crime beyond a reasonable doubt. ***State v. Sartin***, 200 Wis. 2d 47, 53, 546 N.W.2d 449 (1996). We may not reverse a conviction "unless the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). If any possibility exists that the jury could have drawn the appropriate inferences from the trial evidence to find guilt, we may not overturn the verdict. ***Id.*** at 507.

¶25 Based on the evidence, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt on both counts. Again, the elements in this case required (1) otherwise disorderly conduct, which must be similar to the conduct enumerated in the statute in having a tendency to disrupt good order and (2) under circumstances that tended to cause or provoke a disturbance. ***Schwebke***, 253 Wis. 2d 1, ¶41.

¶26 In ***Schwebke***, the court held that a reasonable trier of fact could have concluded that Schwebke's mailings constituted disorderly conduct. ***Id.***, ¶¶42-44. If sending mailings from a remote location can constitute disorderly conduct, then given the twenty-five year context in which his conduct occurred, Zoellick's presence at the restaurant and his repeatedly driving past her residence most certainly could lead a rational jury to the conclusion that Zoellick was guilty of disorderly conduct.

¶27 Zoellick's conduct, when looked at in the context of his pattern of behavior over twenty-five years, shows an obsessive interest at the least. His appearance and conduct in the parking lot at the restaurant and his repeated driving by the home two days later exemplified the extent of his obsession. Such conduct has the tendency to disrupt the peace, safety and good order because, as Linda's testimony demonstrates, his contact was unwelcome and abusive in nature. Further, under such circumstances, his conduct was likely to cause or provoke a disturbance because it caused concern from other members of her family and the community as a whole, including the police. We, therefore, hold that the evidence was sufficient to convict Zoellick on the charges.

¶28 We next address Zoellick's contention that because he was subject to custodial questioning when he made the incriminating statements to Pagel and he had not been ***Mirandized***, the statements should have been suppressed. In reviewing a trial court's determination on a motion to suppress evidence, we accept the trial court's finding of historical fact unless they are clearly erroneous. *See* ***State v. Turner***, 136 Wis. 2d 333, 343-44, 401 N.W.2d 827 (1987). However, whether a person is in custody for ***Miranda*** purposes is a question of law, which we review de novo. ***State v. Buck***, 210 Wis. 2d 115, 124, 565 N.W.2d 168 (Ct. App. 1997).

¶29 An officer's obligation to administer ***Miranda*** warnings to an individual attaches only where there has been a restriction on the individual's

freedom so as to render him or her "in custody." ***Stansbury v. California***, 511 U.S. 318, 322 (1994). In determining whether an individual was in custody for purposes of ***Miranda***, the court must consider the totality of the circumstances. ***State v. Gruen***, 218 Wis. 2d 581, 593, 582 N.W.2d 728 (Ct. App. 1998). "The test is 'whether a reasonable person in the [suspect's] position would have considered himself or herself to be in custody, given the degree of restraint under the circumstances.'" ***Id.*** (quoting ***State v. Swanson***, 164 Wis. 2d 437, 446-47, 475 N.W.2d 148 (1991). This determination depends on the objective circumstances, "not on the subjective views harbored by either the interrogating officers or the person being questioned." ***Stansbury***, 511 U.S. at 323.

¶30 We have held that the factors relevant in determining whether a suspect initially detained for a traffic stop is "in custody" for ***Miranda*** purposes include: the suspect's freedom to leave, the purpose, place and length of the interrogation and the degree of restraint. ***Gruen***, 218 Wis. 2d at 594. When considering the degree of restraint, courts consider whether the suspect is handcuffed, whether a weapon is drawn, whether a frisk is performed, the manner in which the defendant was restrained, whether the suspect is moved to another location, whether questioning took place in a police vehicle, and the number of officers involved. ***Id.*** at 594-95.

¶31 Zoellick first argues that the trial court denied the suppression motion based upon its erroneous belief that a ***Terry*** stop never triggers ***Miranda***. Zoellick misreads the record. Although

the trial court did not expressly reference ***Miranda*** or ***Gruen***, the court clearly considered several of the ***Gruen*** factors before denying the motion. Namely, the court noted that the detention only took a few minutes, the rear door of the squad car was open, Zoellick was not handcuffed and Zoellick was advised that he was not under arrest or in custody. Based on this assessment, the court concluded that "a reasonable person, under those circumstances, would not believe himself to be under arrest or in custody."

¶32 Zoellick next claims that the facts of this case resemble those in ***State v. Morgan***, 2002 WI App 124, ¶17, 254 Wis. 2d 602, 648 N.W.2d 23, where we applied the ***Gruen*** factors and held that the defendant was in custody for Fifth Amendment purposes. ***Morgan***, however, is easily distinguishable.

¶33 In ***Morgan***, the officers had drawn their guns, the defendant was frisked and placed handcuffed in a squad car, four officers were involved and one of the officers had testified that the defendant could not leave during questioning. ***Morgan***, 254 Wis. 2d 602, ¶17. Here, on the other hand, while Zoellick was placed in the backseat of the squad car, he was never handcuffed, neither Preissner nor Pagel ever drew their guns and the door to the squad car was left open.

¶34 Zoellick maintains that Pagel testified that he had "positioned himself so as to block Zoellick from departing during his questioning." The transcript, however, reveals just the opposite. Pagel

testified that Zoellick could have left the car through the door Pagel opened if he had slid over and while he was speaking with Zoellick, he stood "half in" and "half out" of the car. Although he testified that at one point he did sit next to Zoellick, Pagel also testified that he informed Zoellick that he was not in custody and not under arrest prior to questioning him. Further, the detention was temporary and conducted in the vicinity of where Zoellick was stopped solely for the purpose of discerning why Zoellick was in the area. A reasonable person in Zoellick's position would not have considered himself or herself to be in custody under these circumstances. Accordingly, we conclude that the trial court correctly decided that ***Miranda*** warnings were not required and Zoellick's statements to Pagel were admissible.

¶35 Finally, we address Zoellick's contention that the trial court erred in admitting the "other acts" evidence regarding the pattern of conduct between Zoellick and Linda. Zoellick argues that the trial court failed to conduct the analysis for admissibility of "other acts" evidence required by ***State v. Sullivan***, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998).[4]

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[4] When considering the admissibility of "other acts" evidence, the trial court should begin with the ***State v. Sullivan***, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998) analysis: (1) "Is the other acts evidence offered for an acceptable purpose under [WIS. STAT.§] 904.04(2), such as establishing motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident?" ***Id.*** at 72. (2) "Is the other acts evidence relevant, considering the two facets of relevance set forth in [WIS. STAT. §] 904.01?" ***Id.*** (3) "Is the probative value of the

¶36 We will affirm the circuit court's decision to admit evidence if the court properly exercised its discretion. ***State v. Webster***, 156 Wis. 2d 510, 514, 458 N.W.2d 373 (Ct. App. 1990). In exercising its discretion, the circuit court must apply accepted legal standards to the facts of record and, demonstrating a rational process, it must reach a reasonable conclusion. ***Id.*** at 515.

¶37 We reject Zoellick's argument that the trial court needed to perform a ***Sullivan***-type analysis prior to ruling on its admission. Zoellick's characterization of Linda's testimony regarding his pattern of behavior towards Linda as "other acts" evidence is simply wrong. It was a question of relevance for the trial court. As we stated earlier, ***Schwebke*** requires the court to look at the circumstances under which the offending conduct occurred when determining the applicability of the disorderly conduct statute. Linda's testimony about her prior contacts with Zoellick merely put his conduct and her response to his conduct in context for the jury. It was relevant because it demonstrated why Zoellick's conduct went beyond mere personal annoyance and had the potential to disrupt the peace, safety and good order of the community. The trial court recognized as much and permitted the jury to consider the evidence only "on the issue of whether,

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other acts evidence substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by consideration of undue delay, waste of time or needless presentation of cumulative evidence?" ***Id.*** at 772-73.

under the circumstances, the defendant's conduct was disorderly." We find no reason to disturb the court's decision to admit the testimony for this limited purpose.

¶38 In sum, we hold that the disorderly conduct statute can be applied to Zoellick's conduct and based on the facts presented in this case, the complaint set forth the essential facts establishing probable cause to support the disorderly conduct charges and there was sufficient evidence adduced at trial to convict Zoellick on the charges. We also conclude that the trial court properly admitted both the statements Zoellick made to Pagel during questioning and Linda's testimony concerning Zoellick's pattern of behavior over the past twenty-five years. Accordingly, we affirm.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

CIRCUIT COURT'S ORAL RULING

THE COURT: Well, even if you agree that it occurred as long ago as 1988, that is an acknowledgment that it has gone on for decades. A reasonably constituted person would find that type of long-lived obsession to be even more menacing. I can't speak from a woman's point of view, but I think I can empathize with it, and I would certainly find it to be menacing, disconcerting, and threatening.

Given my position, if I had somebody following me around for 20 years, which I don't think it would happen for that long, and I think I'm reasonably constituted, but I would find it to be menacing. I think Justice Bablitch understood that when he wrote the decision here in the Schwebke case. I had not seen the Schwebke case until Mr. Kratz gave me a copy of the case just now. But it reinforces my opinion of the accuracy of my reasoning.

The motion to dismiss is denied. There is probable cause here.

Let's set a trial date and a final plea bargain cut-off date.

CONSTITUTIONAL PROVISIONS

AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or

immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress

may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.